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SOL (MSHA) V. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

PEABODY COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-73
A.C. No. 02-00533-03503

Black Mesa Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, California,
for Petitioner;
Michael O. McKown, Esq., Peabody Coal Company,
St. Louis, Missouri,
for Respondent.

Before: Judge Morris

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. - 801 et seq., (the "Act"), arose from an inspection of the Black Mesa surface coal mine operated by Peabody Coal Company. The Secretary of Labor seeks civil penalties because respondent allegedly violated two safety regulations adopted under the authority of the Act.

Procedural History

After notice to the parties, an expedited hearing was held in Phoenix, Arizona on December 13, 1983. The parties filed post-trial briefs and on March 6, 1984 the judge's decision was issued. On March 26, 1984 the judge received a motion for a rehearing filed by Peabody. The parties were advised by the judge that his jurisdiction had terminated. The motion was, accordingly, forwarded to the Commission.

On April 4, 1984 the Commission directed the judge to consider and rule on the operator's motion and to take such further action as might be necessary or appropriate (Order, April 4, 1984).

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On April 10, 1984 the judge granted the parties an opportunity to state their views concerning Peabody's motion. The judge further indicated that if the motion was granted he would take official notice of the trial transcript in *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (1981).

After considering the response of the parties the judge granted Peabody's motion (Order, April 25, 1984).

On September 11, 1984 a supplemental hearing was held in Denver, Colorado. The parties waived their right to file further briefs and they rested on their oral arguments.

Citation 2006837

In connection with this citation the Secretary of Labor seeks a civil penalty of \$2,000 because Peabody failed to provide a berm on its elevated roadway, thereby violating the mandatory standard published at 30 C.F.R. - 77.1605(k), which provides:

(k) Berms or guards shall be provided on the outer bank of elevated roadways.

Issues

The issues are whether berms are to be provided at the edge of a bench in the working pit of a multiple seam surface coal mine. Further, a secondary issue is whether the diminution of safety doctrine is viable.

Summary of the Evidence at the hearing in December, 1983

The facts surrounding the death of dozer operator Cecil Yazzie are basically uncontroverted.

Petitioner's evidence, in the main, addresses the details of the accident. Peabody's evidence generally addresses the operation of its surface coal mine. A sketch, Exhibit P1, illustrates the location of the highwall, the coal seam, the path of Yazzie's dozer, the keyway and the spoil pile.

William G. Denning testified for MSHA: In November 1982 MSHA Inspector Denning investigated a fatal accident that occurred in the J1-N6 (hereafter J-1) pit at Peabody's Black Mesa coal mine (Tr. 7, 10, 11; Exhibit P1). His investigation established that on November 5, 1982, at the commencement of the shift, at 4 p.m., dozer operator Cecil Yazzie met his supervisor, Moreo, in the pit area. Moreo drove Yazzie through the pit from the coal face on the Blue seam coal bench to Ramp C. Moreo instructed Yazzie in his work. His duties included leveling the shot coal from the previous shifts, making ramps up the coal face, and building portions of Ramp C (Exhibit P1).

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After leveling the shot coal Yazzie proceeded to Ramp C and began working at that location. At about 11:30 p.m. Yazzie, Moreo and Ralph Charlie (shooter/blaster) were located near the bottom of Ramp C. They were preparing to set off a coal shot on the Blue coal seam. Yazzie's dozer, parked on the ramp, was used as protection from the blast. After a delay the shot was set off. Moreo found no misfires and he left the coal bench. While he was leaving the pit Moreo passed Yazzie who was starting to tram his dozer from Ramp C through the pit to the carry-all bus at Ramp E. Moreo continued out of the pit and stopped for a few minutes to talk to the coal loader operators. He then proceeded to Ramp E. After arriving at Ramp E, Moreo became concerned because he could not find Yazzie. Moreo then drove to the coal face on the Blue seam and, after a brief inspection, he observed Yazzie's upset dozer in the keyway near Ramp C. (Tr. 13; Exhibit P1). Moreo, who was also an Emergency Medical Technician, and others could not revive the unconscious Yazzie (Exhibit P1).

The keyway, or ditch, was an area excavated by the dragline along the seam coal bench. It was 31 feet to the bottom of the keyway. At the time of the accident the keyway extended from Ramp C approximately 600 feet toward Ramp E. The inspector's investigation further established that, after leaving Ramp C, Yazzie's dozer traveled in a path at a slight angle away from the keyway. After traveling approximately 75 feet Yazzie changed directions and went toward

the keyway. He made another slight correction when 40 feet from it but he continued in the general direction of the keyway. After the second change in direction he traveled approximately 35 feet before toppling off the coal bench into the keyway. At that point his dozer was at the edge of the coal shot (Exhibit P1).

The dozer tread marks for the final 35 feet indicate the dozer was still tramping forward at the time of the accident. It appeared that the outer edge of the coal bench `collapsed under the dozer, causing it to roll sideways off of the bench (Exhibit P1).

The dozer fell about 31 feet, impacting the top edge of the rollover protective structure. Yazzie remained inside the operator's cab; however, it appeared he was not wearing the seat belt that was provided (Exhibit P1).

After the coal shot and before this accident occurred the dragline had resumed operations. While digging, the dragline's lights illuminated the pit and accident area; however, as the

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dragline spoiled, it swung away from the pit, leaving the area relatively dark.

This change from light to dark could have affected Yazzie's perception. Also while spoiling, the dragline created dust in the pit that could have affected visibility (Exhibit P1).

Yazzie was normally assigned to work at the J-7 pit area. He worked in this particular pit, J-1, only when needed. A keyway, as excavated in the J-1 pit, is sometimes, but not always, present in the J-7 pit. The unexplained changes in the direction of the dozer could have been made by Yazzie in order to tram the dozer around the shot coal. Since Yazzie was newly assigned to the J-1 pit he may have forgotten about the keyway being adjacent to the shot coal and trammed the dozer into it (Exhibit P1).

As a result of its investigation MSHA concluded that the accident occurred due to the fact that Yazzie turned the dozer and trammed it toward the keyway. Since there was no berm along the outer edge of the elevated coal bench there was nothing to prevent the dozer from traveling into the keyway. MSHA could not determine the reason why Yazzie turned the dozer toward the keyway. In MSHA's opinion a contributing factor to the fatality was Yazzie's failure to wear the seat belt provided in the dozer (Exhibit P1).

MSHA's inspection manual contains guidelines construing the berm standard. The manual states:

The requirements of Section 77.1605(k) apply to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.

"Elevated roadways", as used in this requirement, are roadways of sufficient height above the adjacent terrain to create a hazard in the event mobile equipment ran (sic) off the roadway.

"Berm" as used in this requirement means a pile or mount of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guard rails are used in lieu of berms, they shall be of substantial construction.

The width of the haulage road does not preclude the need for berms or guard rails.

(Exhibit P8).

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In December 1981, in response to questions concerning the berm standard, the administrator for coal mine safety and health issued MSHA's policy memorandum 81-40C. The administrator, on behalf of MSHA, stated in part as follows:

Section 77.1605(k), 30 CFR 77, is applicable to all elevated roadways on mine property, including roads used to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways. Berms or guards are required on all exposed banks of elevated roadways. Thus, elevated roadways with two exposed banks are required to have berms or guards on both sides.

(Exhibit P7).

At the time of the accident the dragline had exposed the Blue coal seam. Two ramps were being used for access to the pit area (Tr. 12, 13; Exhibit P1).

In the inspector's opinion a berm should have been placed from the point where Ramp C intersected the Blue coal seam bench back towards Ramp E, a distance of about 600 feet (Tr. 22). The inspector considered the coal bench a roadway because the same type of equipment uses the coal bench and the haul roads (Tr. 23).

Surface changes occur in the mine as mining progresses from one seam to another but there is always a bench in the coal pit used for a travelway (Tr.23).

The MSHA surface inspection manual (Exhibit P8 at pages 336, 337) and the MSHA policy memorandum define an elevated roadway. These definitions, in the inspector's opinion, are applicable to Peabody's work place (Tr. 24-26, 61). The inspector relied on the policy memorandum in forming an interpretation of what constitutes a roadway (Tr. 43). A roadway is a travelway used to transport equipment, personnel and coal S (Tr. 43, 44, 61). But the inspector would not consider a surge pile to be a roadway (Tr. 49, 50).

In the inspector's opinion there are some "gray areas" as to what constitutes a roadway; in addition, an inspector has a degree of judgment as to the citations he can issue (Tr. 50, 51).

The lack of a berm, as here, presented a hazard to a miner such as Yazzie (Tr. 26). A berm can either stop a vehicle, redirect it, or warn an operator that he is in close proximity to the edge (Tr. 27, 39, 40).

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In the inspector's opinion a berm would not be necessary if the dozer was cleaning the coal or pushing dirt off the edge of the bench (Tr.50).

Respondent's Evidence

Buck Woodward, Tracy Northington, Alan Cook, Don Holt, Rick Contratto and Joe Johnson testified for respondent.

At the Black Mesa mine Peabody uses a multiple seam mining process for its five seams of coal (Tr. 70-72). The company uses a color coding system to differentiate between its coal seams (Tr. 71). These seams are respectively designated, from the surface down, as green, blue, red, bottom red, and yellow (Tr. 71; Exhibit F).

The coal bench is the area where the dragline and other pieces of mining equipment are located. The highwall is the face left by the dragline and the stripping equipment (Tr. 71; for a cross section view see Exhibit B).

Black Mesa uses a Marion 8750 dragline to first cut a keyway or ditch (Tr. 71-73). A drill crew then drills through the overburden to the first coal seam (Tr. 73). The dragline removes the drilled and shot overburden by depositing it in an area that has already been mined (for an illustration of the pit configuration see Exhibit C).

The highwall in the pit results when the overburden is removed. The removal of the overburden exposes the coal seam which is, in turn, drilled and shot. Shovels and other equipment load the coal onto trucks (for an illustration of coal loading operation see Exhibit D).

The mining sequence continues as the dragline removes the coal. Drilling, shooting, and loading activities follow behind the dragline (Tr. 74). The dragline, using the wide radius of its shovel, spoils the overburden and later the parting (FOOTNOTE 1) into a pit where the coal has already been removed (Tr. 74).

In the J-1 pit the bench was 130 feet wide. Peabody tries to maintain that distance but it narrows slightly at the bottom coal seam (Tr. 15).

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As a result of this citation MSHA requires a berm when the topmost (green) coal seam is exposed. The berm must be installed prior to any shooting. The berm is approximately six feet high and sixteen and one half feet wide at the base (Tr. 77). This berm must later be pushed off so the crews can shoot the coal beneath it.

MSHA also requires a third berm on the parting between the second and third seams (blue and green seams). This berm must, in its turn, be pushed off so the drilling crews can fragment the area beneath it. The dragline, in turn, removes the parting (Tr. 79).

The construction and removal of the berms continues as the mining progresses. The progression is both downward as the coal seams are exposed and lateral as the dragline removes the coal or the parting (Tr. 79-80). In this mining progression the MSHA citation requires that 12 berms be constructed and removed (Tr. 80).

The pit, designated as J-1, is the working pit of an active surface coal mine. Haulage trucks and loader crews are actively engaged in the coal removal. The haulage trucks, 16 feet 8 inches wide, primarily drive down the middle of the bench, or a bit to the highwall side (Tr. 82). In the pit there is one direction of traffic. Once the trucks reach the ramp they go out of the pit area until they reach a permanent haulage road. The trucks then travel to a preparation site (Tr. 88).

In the opinion of Peabody's engineer an active pit area is not a roadway. One reason is that the area changes daily. Haul roads at mines are designed to certain specifications and they take into consideration the speed of vehicles using them. Also the drainage of a haul road is a factor to be considered (Tr. 82, 83).

Peabody uses track type and rubber-tired dozers to emplace its berms. When necessary dump trucks haul in material to construct the berms (Tr. 81). Berms, such as MSHA requires here, are not required at any other mine in the West (Tr. 84).

In the opinion of Peabody's engineer a berm in place here would not have prevented the accident. Yazzie was entering the coal shot area and his duties would have required that he level the area (Tr. 84).

Peabody's industrial engineer conducted a time and motion study relating to the installation and removal of berms (Tr. 97). A videotape (Exhibit U) shows the building of a berm with a Clark 380 rubber-tired dozer (Tr. 98-100). The front portion of the

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dozer goes out over the edge of the bench when building and even more so when removing the berms (Tr. 98-102). In building a berm six feet high the average dozer cycle (FOOTNOTE 2) is .47 minutes.

Normally berms are built during the third shift, from midnight until 8 a.m. Northington has monitored over 4000 dozer cycles (Tr. 101).

When berms must be built at the edge of parting seams then material must be hauled in to construct the berms since there is no loose material available. Peabody estimates, that on an annual basis, it has hauled in 150,000 yards of material or about 2,000 truck loads, to build such berms (Tr. 104).

In removing the berms the dozer operator, whose vision is blocked by his equipment, goes right to the edge. Some operators have stated this was unsafe (Tr. 105).

Trucks in the pit never operate closer than within 80 to 100 feet of the edge of the bench (Tr. 106).

Peabody submitted a time and motion study comparing the "before and after" exposure of its men and equipment in abating this citation. All calculations were keyed to an annual basis (Tr. 107; Exhibits V, W, X).

Before the issuance of this citation Peabody's activities resulted in its miners and equipment being exposed to the hazard of being within 20 feet of the ditch edge for 1,085.8 hours. This exposure was primarily the time required to drill a 20 foot zone next to the edge of the ditch. This exposure is still incurred because it is still necessary to drill and remove the coal in the 20 foot zone (Tr. 108). But the exposure in this zone is now increased to 1,880.6 hours. This 73 percent increase results from the construction and removal of the berms now required by MSHA (Tr. 109; Exhibit X).

Before the berms were required the only dozer exposure to the ditch edge occurred during the cleaning of the coal. This was for 40.48 hours (Tr. 109; Exhibit W). As a result of abating the citation the exposure has increased to 831.5 hours, an increase of 1954 percent.

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In removing the coal, Peabody's rubber-tired dozer cuts a 14 foot swath and approaches the edge 7,619 times (Tr. 109; Exhibit V). Since Peabody is now required to build and remove berms there are 103,451 cycles to the ditch edge, an increase of 1,612 percent (Tr. 109-110; Exhibit V). Peabody has constructed 58 miles of berms to abate this citation (Tr. 115, 116).

Peabody places berms on its active haul roads where there is vehicular traffic traveling "at a good speed" (Tr. 125).

In the opinion of mine superintendent Joe Johnson the standard does not apply to the working area of the pit. The company is constantly mining this area. MSHA has never previously cited the company for failure to have berms in an active pit area. But the company has been cited due to an eroded berm on a haul road (Tr. 151, 154, 155).

Don Holt, Peabody's safety director for its mines in Kentucky and Ohio, is familiar with MSHA regulation - 1605(k). In Holt's opinion the purpose of the regulation is to provide a guide on a haul road to keep vehicles within a confined area. Further, in Holt's opinion, the section does not apply to the working pit of surface mines (Tr. 132-134).

In the mines in the eastern portions of the United States the working coal pits are 45 to 80 feet wide. It would practically shut down such mines if MSHA requires berms as it does here. MSHA does not now require berms in other active working pits (Tr. 136, 137).

Summary of the Evidence adduced at the
hearing in September 1984

Peabody's Evidence

Buck Woodward, Peabody's planning engineer, testified that on July 30, 1984 he toured the El Paso operations including the pit where Citation 159662 was issued for a violation of the berm standard. (Supplemental transcript at pages 7 and 8).

El Paso mines limestone as an aggregate for concrete. In its mining process the company initially removes 30 feet of red rock. The rock has no commercial use (S. Tr. 10, 11).

After the removal of the initial overburden El Paso shoots a 10 foot by 10 foot pattern and removes the rock from two lifts. The blasting is done in a perpendicular direction towards the highwall (S. Tr. 11, 18). (Drill holes can be seen in Exhibit Y).

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On the other hand, at Peabody's Black Mesa surface coal mine, the overburden coal and parting is mined from the middle of the pit in a lateral direction (S. Tr. 18).

On the day of Woodward's visit at El Paso the top bench was 200 feet wide. As the rock is mined this bench will be reduced to a width of 60 feet (S. Tr. 12, 13). The citation issued to El Paso which evolved into the Commission decision, previously cited, alleges the El Paso bench was as narrow as 45 feet (S. Tr. 28). The coal bench at Black Mesa cannot vary and it remains at a fairly constant width of 130 to 140 feet (S. Tr. 21).

It takes one to two years to reduce the El Paso bench to a 60 foot width from the 200 foot width. But at Black Mesa the dragline removes a 400 by 200 foot wide area in four and a half days (S. Tr. 18). El Paso does not have any large overburden stripping equipment (S. Tr. 19).

While at El Paso Witness Woodward observed the company's vehicles operating at 20 to 25 mph. At Black Mesa the trucks and the coal removal equipment operate at 3 to 5 mph. The Black Mesa vehicles only attain the greater speeds when they reach the ramps (S. Tr. 17, 19, 20).

On the day of Woodward's visit the El Paso berm was 40 feet from the edge of the lower lift face. There is a road to each side of the berm. The haulage road, towards the highwall side, is used for pit inspection and rock removal from the top lift. The road between the berm and the drop off is used for drilling and shooting equipment and supervisors' vehicles. It is also necessary to use the road between the berm and the edge to knock off whatever loose rock remains after a blast (S. Tr. 14-16).

The El Paso berm in place in July, 1984 had been there for six months. It would likely be there another six months (S. Tr. 14). On the other hand, the Black Mesa berms can be changed within three hours (S. Tr. 20, 22).

The trucks at El Paso, according to Citation 159662, (issued in the El Paso case) were being operated within 10 to 14 feet of the edge. On the other hand, at Black Mesa the Peabody haulage trucks get no closer than within 60 feet from the edge of the bench (S. Tr. 21, 29, 32, 33).

There is more activity at a coal bench than at a rock quarry (S. Tr. 22).

Witness Woodward concluded that substantial differences exist between a surface coal mine and a rock quarry. As a result it is suggested that the berm standard is not applicable to

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Peabody. These differences include the distances the vehicles are from the edge (60 feet versus 10 to 14 feet); the speed of the vehicles in the pit (3 to 5 mph versus 20 to 25 mph); the width of the pit (a constant 130 to 140 feet versus 200 reducing to 45 to 60 feet). The duration the berms must remain in place (3 hours versus one to two years) (S. Tr. 25, 28, 29, 31, 34).

MSHA's Evidence

Sidney R. Kirk, an MSHA supervisory inspector, issued Citation 159662 against El Paso Rock Quarries (S. Tr. 38, 39, 48).

Witness Kirk agreed that his testimony before Judge Moore in the El Paso case was more correct than his recollection at this hearing. When the El Paso citation was issued the quarry bench was 60 to 80 feet wide. Vehicles traveled within 10 to 12 feet of the edge (S. Tr. 49, 50; El Paso transcript at page 26).

When he inspected the El Paso site Inspector Kirk learned the company had a speed limit of 5 to 8 mph. He also observed vehicles traveling at that speed (S. Tr. 41, 42). In his opinion the El Paso vehicles in the limited bench area could not attain speeds of 20 to 25 mph (Tr. 43).

The inspector further indicated that the berm shown in the July 1984 photograph did not comply with the berm regulation, 30 C.F.R. - 56.9-22. In his opinion the berm should have been located between the drill holes and the edge (S. Tr. 45).

Inspector Kirk indicated he has not inspected a surface coal mine nor enforced any MSHA regulations concerning such a mine (S. Tr. 48, 53).

In the inspector's view the length of time the El Paso berm remains in place depends on the demand for the product. At the time of his El Paso inspection the berm could have been removed almost every twenty-four hours (S. Tr. 44, 45).

Discussion

Credibility determinations arise in the case. Particularly, a conflict exists between the testimony of Witnesses Woodward and Kirk. I credit Kirk's version as to the speed of the El Paso trucks on the date he issued Citation 159662. Mr. Kirk was obviously at the El Paso site on that day. Mr. Woodward was not present.

On the other hand, I credit Peabody's evidence as it relates to the operation of the Black Mesa Coal surface coal mine.

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Peabody's witnesses have the expertise derived from participating in the daily mining of coal at that location.

The threshold issue presented here is whether the Commission decision in *El Paso Rock Quarries, Inc.*, supra, is controlling precedent. In the initial decision of this case, 6 FMSHRC 612 (March, 1984), this judge concluded he was bound by the decision. In *El Paso* the Commission considered whether a violation of the applicable berm standard occurred. The particular berm standard in *El Paso* applied to metal and non-metallic open pit mines but it has the same wording as the standard in contest here. In *El Paso* the Commission held that a bench (FOOTNOTE 3) in a quarry is an "elevated roadway" within the meaning of the standard. The *El Paso* decision recited that the operator's trucks were operated 40 feet above a lower bench and the Commission held that "under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of Section 56.9-22," 3 FMSHRC at 36. The *El Paso* decision itself does not state how close the *El Paso* vehicles operated to the edge of the bench.

For the reason hereafter stated I find that the *El Paso* decision is not controlling. It now appears that there are substantial differences between the *El Paso* rock quarry and the Peabody multiple seam surface coal mine. In the *El Paso* scenario the trucks were operated within 10 to 12 feet of the edge of the bench. On the other hand, Black Mesa trucks do not operate closer than 60 feet from the edge of the fairly constant 120 to 140 foot wide bench. Substantial differences also arise in the duration of time the berms are required to be in place and in the width of the bench.

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Based on the foregoing factors I conclude that El Paso Rock Quarries, supra, is not a binding precedent.

The secondary issue is whether Peabody violated the berm standard. For the reasons hereafter stated I conclude that no violation occurred. It is clear that berms are required on "elevated roadways." Further, a roadway is used to transport coal, equipment, and personnel. A similar dictionary definition recites that a road is an "open way for vehicles, persons, and animals", Webster's New Collegiate Dictionary (1979) at 993.

I do not find on this record that any vehicles transported coal, equipment or personnel closer than within 60 feet of the edge of the Peabody bench. The difference between operating not closer than 60 feet of the edge and operating within 10 to 12 feet of the edge is crucial. A distance of 60 feet is not insubstantial. An interstate highway lane measures 12 feet. If no vehicle is ever shown to have been operated within 5 such lanes of an edge, I cannot hold that the unused 60 foot portion can nevertheless be somehow denominated as a "roadway."

In his post trial brief the Secretary asserts that in deciding whether the travelway in question here is a roadway the Commission should be guided by the principle that the Act and the regulations should be construed liberally and expansively to effectuate the Congressional purpose and promote the safety of the miner. Hanna Mining Company, 3 FMSHRC 2045, 2048 (1981), MSHA v. Westmoreland Coal Company 606 F.2d 417, 420 (4th Cir.1979).

I have no quarrel with the law cited by the Secretary. However, I find it inapplicable in this case. Peabody's uncontroverted evidence concerning the building and removal of berms shows some hazards are involved in the process. Based on this evidence I cannot conclude that the safety of the miners is promoted in the activities required to abate this citation.

The Secretary further relies on his several policy memoranda interpreting this regulation (Exhibits P7 and P8). The difficulty with his memoranda is that it assumes facts not established on the record. In addition, the inspection manual and MSHA's policy memorandum (Exhibits P7 and P8) do not clarify the problem. The manual merely states that - 77.1605(k) applies to an "elevated haulage road"; further, such roadways are "roadways." The policy memoranda recites that - 77.1605(k) applies to "all elevated roadways" and berms are required on all exposed banks of "elevated roadways."

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This 60 foot portion of the bench cannot now automatically become a roadway because it has not been used to transport coal, equipment and personnel. True, dozer operator Yazzie was at the edge of the bench but his duties included removing the coal. The coal itself was in a condition of upheaval as a result of the blasting. I decline to defer to the Secretary's interpretation of the regulation in these circumstances.

In support of his position the Secretary also relies on Cleveland Cliffs Iron Company, 3 FMSHRC 291 (1981) and Rock Valley Cement Block and Tile 2 FMSHRC 1906, 1914-1916; MESA v. Peabody Coal Company, VINC 77-102-P.

The foregoing cases are clearly distinguishable from the instant case. In each of these cited cases there was some use by vehicles, albeit minimal, of the travelway that the Secretary felt should be bermed.

In Cleveland Cliffs the issue centered on whether certain use of a road constituted hauling. The Commission held that the term "hauling" includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the normal mining routine, 3 FMSHRC at 293. As previously observed there was no hauling of any type closer than 60 feet from the edge of Black Mesa's bench.

In Rock Valley Cement, Block and Tile Judge Koutras rejected the operator's argument that a roadway and the berm requirement can only exist in circumstances which clearly show that the mined materials are regularly hauled out of the mine along clearly defined haulage roadways designed and regularly used for such purposes. The cited decision is not controlling as there is no roadway use whatsoever of the 60 foot area under discussion in the instant case.

In Mesa v. Peabody Coal Company, the arguments concerned whether the roadway in question was elevated and whether a distinction existed between an access road and a haulage road.

The parties waived further briefs after the supplemental hearing but the oral arguments were entered on the record.

The Secretary initially claims El Paso Rock Quarries, supra, is controlling since identical standards are involved. This point has been addressed and found to be without merit.

The Secretary further argues that the differences between the El Paso case and this case are not crucial. Specifically, it is contended the distance the Peabody trucks operate from the edge of the bench relates to gravity and not to the fact of a violation.

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I am not persuaded. I refuse to apply the standard in a vacuum. The Secretary bears the obligation to prove that the activity he seeks to control is fairly within the terms of the regulation.

The Secretary states that not requiring berms would lessen the safety of the miners. This issue has been reviewed and found to be without merit.

In its post-trial brief filed after the initial hearing Peabody also raised certain issues. These require discussion.

Peabody asserted it should prevail because the regulation is vague and lacks clarity. Peabody further cites the failure of MSHA to previously enforce the regulation at this site and elsewhere as to coal seam benches.

The foregoing position is basically a plea in estoppel. But it is established that estoppel does not apply against the federal government. Cf. King Knob Coal Company, 3 FMSHRC 1417, 1421 (1981).

Peabody also argues that its time study (Witness Northington) and its video tape (Exhibit U) are not offered to prove that MSHA's enforcement of - 77.1605(k) causes a greater hazard. But it argues that if MSHA interprets the regulation in such a way that dangers are increased then that interpretation is not correct. In short, Peabody agrees that berms on an elevated roadway increase safety. But a coal bench is not a roadway and if MSHA interprets it to be so then MSHA is wrong because there is a clear increase in danger. It is axiomatic that the greater the exposure to the hazard, the more likely an accident. Peabody's uncontroverted evidence establishes that the placement of berms can be hazardous (Tr. 143). Further, the type of berms MSHA requires here (some 58 miles) are transient. Their duration can be as short as three hours (Tr. 144). But a berm on a bona fide elevated roadway is not so transient (Tr. 83).

While Peabody's video tape and support testimony were generally admissible it was basically a revisit to the diminution of safety, or, as it is sometimes called, the greater hazard doctrine. Peabody apparently anticipated an adverse ruling because it asserts that Penn Allegh, 3 FMSHRC 1392 (1981), is not controlling because the case dealt with explicit cabs and canopies regulations. But, in the instant case, the parties are arguing over a relatively vague standard.

I disagree. Peabody seeks to invoke the diminution of safety, or the greater hazard doctrine. In Penn Allegh the

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Commission refused to approve such an attempt to short-circuit the Act. The Commission observed that when those situations exist where the application of the standard diminishes, rather than enhances, miners' safety the operator may petition the Secretary of Labor for relief from the application of the standard. The Act provides a set procedure for granting or denying the relief sought. Penn Allegh at 1397. In addition, there are detailed regulations governing the processing of such petitions, 30 C.F.R. Part 44.

In sum, Peabody's evidence seeking to establish the diminution of safety, or greater hazard doctrine, is rejected.

Peabody's further arguments are that MSHA failed to offer as a witness the inspector who wrote the citation and in addition failed to offer in evidence the citation itself. These arguments lack merit. Inspector Denning testified as to the issuance of the citation (Tr. 28). He further authored Exhibit P1, an extensive report of this fatality. In Exhibit P1 MSHA entered its finding as follows: "A berm was not provided on the elevated outer back of the haulage road in pit 001-0 from Ramp C for a distance of about 600 feet along the Blue seam coal bench, a violation of Section 77.1605(k), 30 CFR."

Peabody's claim that MSHA's interpretation would shut down the surface coal mine operations in the United States is rejected.

Peabody has obviously not shut down this surface coal mine operation at the Black Mesa Mine in Navajo County, Arizona. Peabody's evidence and argument that the mines in the eastern part of the United States would be shut down must await the detailed evidence in such a case. In short, I decline to rule on a hypothetical situation particularly here, where I fail to find a violation.

For the reasons stated herein I conclude that Citation 2006837 and all penalties should be vacated.

Citation 2006838

In this citation the Secretary of Labor seeks a civil penalty of \$241 because Peabody's employee Yazzie failed to wear a seat belt thereby violating the mandatory standard published at 30 C.F.R. - 77.1710(i) which provides:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

- (i) Seat belts in a vehicle where there is a danger of overturning and where roll protection is provided.

Issue

Did Peabody violate the seat belt regulation?

Summary of the Evidence

All of the evidence relating to this citation was heard at the initial hearing of the case in December, 1983. Neither party sought to offer evidence on this subject at the supplemental hearing.

MSHA's evidence shows that Yazzie was not wearing a seat belt at the time of the accident (Tr. 28; Exhibit P1). MSHA, in its written report, concluded the failure to wear the seat belt in the vehicle was a contributing factor to Yazzie's death (Exhibit P1).

Peabody's mine superintendent indicated that the company requires that seat belts be worn. The workers are informed of this requirement through task training, annual retraining, individual contacts and general discussion (Tr. 153).

If an employee is caught not wearing a seat belt he is given a warning. If it occurs again he receives a written warning (Tr. 153).

Peabody's safety manager and its pit boss confirmed the superintendent's testimony. Further, he indicated that the company reinstalls seat belts if they are damaged or removed (Tr. 117, 120, 121, 129, 147). Equipment operators have been disciplined for failing to wear seat belts (Tr. 130, 148, 149). The discipline graduates to suspension or discharge (Tr. 130).

Discussion

The Secretary, in his post trial brief, is aware of the Commission decision in Southwestern Illinois Coal Corporation, 5 FMSHRC 1672, (October 1983). But the Secretary claims the majority decision violates the long line of strict liability cases imposed by the Act. Further, the Secretary argues that the minority view is more persuasive.

The Secretary's contentions are rejected. I am obliged to follow the majority view in Southwestern Illinois Coal Corporation.

The Secretary apparently anticipated this ruling and he argues that, in any event, Peabody has not satisfied the criteria of North American Coal Company, 3 IBMA 93, cited in Southwestern Illinois. The Secretary's argument is this: Pit boss Contratto had never given a written seat belt warning to anyone and he was unable to present actual examples of a warning. I agree the

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evidence shows that Contratto, personally, had never given an employee a written disciplinary notice for failing to wear a seat belt (Tr. 148, 149). But the Secretary misconstrues the evidence in the transcript at pages 149 and 150. Contratto testified that there there have been written disciplinary actions. But he hadn't brought such notices to the hearing (Tr. 148-150).

On this record witnesses Contratto, Johnson and Cook establish that Peabody was diligent in the enforcement of its seat belt regulation (Tr. 120, 121, 129, 130, 153, 154). Southwestern Illinois criticized the operator because the wearing of belts was delegated to the discretion of each employee. This is not the situation here. The witnesses establish that Peabody was diligent in its enforcement of the seat belt regulation.

I further note that no facts indicated that the company knew Yazzie had his seat belt off at the time of the accident; if, in fact, it was off (Tr. 29).

I reject the Secretary's arguments.

For the foregoing reasons Citation 2006838 and all penalties therefor should be vacated.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Peabody did not violate the mandatory standard published at 30 C.F.R. - 77.1605(k), and all proposed penalties therefor should be vacated.
3. Peabody did not violate the mandatory standard published at 30 C.F.R. - 77.1710(i), and all proposed penalties therefor should be vacated.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2006837 and all proposed penalties therefor are VACATED.

